

July 30, 2014

Robert Khuu
Jones & Mayer
3777 North Harbor Blvd.
Fullerton, California 92835

Re: Your Request for Advice
Our File No. I-14-107

Dear Mr. Khuu:

This letter responds to your request for advice regarding the conflicts-of-interest provisions under Government Code Section 1090 et seq. (“Section 1090”).¹ Because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. In addition, we do not render advice based on past conduct. (Section 1097.1(c)(2).)

Because you provide only limited facts that do not identify a specific public official who may be subject to Section 1090, we are only providing informal assistance and do not deem this letter to meet the requirements to permit the requester to offer the letter into evidence in a Commission enforcement proceeding or criminal prosecution regarding Section 1090. (See Section 1097.1(c)(5).)

Finally, pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the Orange County District Attorney’s Office concerning potential issues raised under Section 1090, and we did not receive a written response from either entity.

QUESTION

Does Section 1090 prohibit the Fullerton City Council from entering into or renewing contracts with city contractors who are clients of a firm that employs a member of the City Council?

¹ All further statutory references are to the Government Code, unless otherwise indicated.

CONCLUSION

Yes. Based on the limited facts you have provided, Section 1090 prohibits the Fullerton City Council from entering into or renewing contracts with city contractors who are clients of the firm currently employing a councilmember.

FACTS

Your office represents the City of Fullerton as City Attorney, and it is on the City's behalf that you request this advice. On or about May 1, 2014, a councilmember accepted employment with a private firm that provides public relations, land use, and government affairs services to businesses. The councilmember is apparently employed in the capacity of an independent contractor with the firm even though he or she is listed as one of the firm's vice presidents and has firm business cards. With respect to compensation, the firm provides the councilmember a monthly fee, a commission based upon clients brought in, and a year-end bonus based upon company-wide profits.

The firm currently has contracts to provide services to certain city contractors that were entered into prior to the councilmember taking a seat on the council. However, there exists the potential for these city contractors to renew their contracts with the City. In addition, the firm may represent clients who contract with the City in the future.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Is the City Councilmember subject to the provisions of section 1090?

Section 1090 provides, in part: "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members."

City councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson v. Call*, *supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);² 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig*, *supra*, at p. 351 citing *Stigall v. City of Taft*, *supra*, at pp. 569, 571.)

Here, the Fullerton City Council, including the councilmember, will make decisions about whether to enter into and/or renew contracts with various city contractors. These future decisions thus involve contracts.

Is the councilmember making or participating in making a contract?

As a member of the Fullerton City Council, which presumably must approve any agreement between the City and one of its contractors, the councilmember will be making or participating in making a contract.

Does the councilmember have a financial interest in the contract?

Under section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” (*People v. Honig*, *supra*, 48 Cal.App.4th at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although section 1090 nowhere specifically defines the term “financial interest,” case law and Attorney General Opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 645, 651-652; see also *People v. Vallergera* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

In addition, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934)

² It is noteworthy to point out that Opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.), especially where, as here, it has regularly provided advice concerning Section 1090, et al. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

2 Cal.2d 141, 146 [(h)owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void"].) Further, “the certainty of financial gain is not necessary to create a conflict of interest . . . (t)he government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

With these principles as a backdrop, we turn to the issue concerning the potential conflict of interest presented by this matter. In a 2003 Attorney General Opinion, the board of a redevelopment agency anticipated entering into contracts with business firms intending to locate or expand their offices in a certain redevelopment project area. (86 Ops.Cal.Atty.Gen. 187 (2003).) Several of those businesses were clients of one of the board member’s promotional products company. (*Ibid.*) In determining that the board member would have a financial interest in any contracts between the redevelopment agency and those businesses, the Opinion stated:

The board member would have a “financial interest” in the contracts due to his business relationship with the contracting parties as a supplier of goods or services. (See 85 Ops.Cal.Atty.Gen. 176, 177-179 (2002); 85 Ops.Cal.Atty.Gen. 34, 35-37 (2002).) In this regard, the board member could be influenced by the prospect of future business opportunities directly related to the contracts or by a desire to maintain favorable ongoing relationships with the contracting parties. The Legislature has made clear that ongoing business relationships may represent financial interests for purposes of section 1090. (See, e.g., § 1091, subd. (b)(5), (b)(6), (b)(8).) The purpose of section 1090 “is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official’s decision . . .” (*Stigall v. City of Taft* (1962) 58 Cal.2d 656, 569; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 659; *Frazer-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 215.)

(86 Ops.Cal.Atty.Gen. at p. 188.)

Here, similar to the situation just described, the councilmember will be influenced by a desire to “maintain favorable ongoing relationships” with not only the firm that employs him or her but also the clients of the firm seeking to contract or renew³ a contract with the City. Indeed, it is difficult to imagine how the councilmember would ever be able to provide his or her

³ A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

absolute, undivided allegiance to the City when participating in the contracting process involving clients of the firm. This is especially true given the councilmember's compensation package includes not only a monthly fee and commission based on newly acquired clients, but also a year-end bonus. To be sure, a real potential exists for the councilmember to curry favor with his or her firm and the firm's clients understanding that it may ultimately affect his or her year-end bonus and future business opportunities. This is exactly the type of indirect interest Section 1090 attempts to thwart. (See, e.g., 88 Ops.Cal.Atty.Gen. 106, 107 (2005) citing *Frazer-Yamor Agency, supra*, 68 Cal.App.3d at pp. 214-215 [California courts strictly enforce Section 1090, and have consistently voided contracts where they find the public officer has an indirect interest in the contract; indeed, even though an officer may not directly benefit from the terms of the contract, it is significant that the contract will contribute to the financial health of the contracting party with which the officer is associated].)

The conclusion that the councilmember has a financial interest in contracts between the City and clients of his or her firm is further supported by looking to the statutory exceptions for Section 1090. (See 85 Ops.Cal.Atty.Gen. 34 (2002) [it is appropriate to look to the definitions of the remote and non-interest exceptions contained in sections 1091 and 1091.5 for guidance in determining what falls within the scope of the term "financial interest" as used in Section 1090].)

Turning to the statutory exceptions, one appears relevant based on the facts you have provided. Under Section 1091(b)(8), an official has a remote interest in a contract entered into by the body or board of which they are a member if they are a "supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office." Thus, a councilmember would have a financial interest in a contract entered into by the City Council if he or she provides services to the party contracting with the City, but only a remote interest if those services were provided for at least five years prior to election to the City Council.

Here, as mentioned, the councilmember is employed by a firm that provides various services to clients who currently have contracts with the City and to clients who may have contracts with the City in the future. The existence of the instant exception further supports the conclusion that the councilmember (and the City Council) would have a financial interest in all instances where clients of the councilmember's firm either enter into or renew contracts with the City. We note, however, that because the councilmember only began employment with the firm on May 1, 2014, the exception under Section 1091(b)(8) would not apply.

Based on the facts provided, the councilmember and the Fullerton City Council would have a conflict of interest under Section 1090 involving the approval of contracts, including those being renewed, between the City and clients of the councilmember's firm. As mentioned, the remote interest exception under Section 1091(b)(8) does not apply in this situation and we do not find any other exceptions to be applicable.

You have asked how such a conflict may be avoided where there are no applicable exceptions. In limited circumstances, a "rule of necessity" has been applied to allow the making

of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the contract is available; the rule “ensures that essential government functions are performed even where a conflict of interest exists.” (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.) You have provided no facts to suggest the “rule of necessity” would apply in the present situation.

When applicable, Section 1090’s command is absolute; neither the person with the prohibited financial interest nor any body of which the person is a member may enter into the contract. Put another way, the prohibition cannot be avoided merely by having the financially interested officer or employee abstain from participating in the contracting process. (*Fraser-Yamor, supra*, 68 Cal.App.3d at pp. 211-212; 78 Ops.Cal.Atty.Gen. 362, 368 (1995).) Short of the councilmember terminating his or her employment with the firm, a conflict of interest will continue to exist whenever a contract involving a client of the councilmember’s firm comes before the City Council for approval. (See 86 Ops.Cal.Atty.Gen. at p. 190 [a conflict of interest under Section 1090 will continue to exist as long as the board member is a supplier of goods or services to the contracting party].)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl